United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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77-2038

In the

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES ex rel. ANTHONY BRUNO,
Petitioner-Appellant,

-against-

J. EDWIN La VALLEE, Warden of Clinton Prison, Dannemora, New York,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PETITIONER-APPELLANT

UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR PETITIONER-APPELLANT

Rebuttal of Respondent's Point I:

JUDGE GOLDSTEIN WENT FAR BEYOND URGING DIBARI TO TELL THE TRUTH

Respondent's Point I argues that all Judge Goldstein did was to urge witness DiBari to tell the truth, and that such urging did not deny a fair trial. Petitioner agrees that if all Judge Goldstein and Assistant District Attorney Helfand had done was to urge DiBari to "tell the truth", petitioner would have no claim on that ground. However, that is not what happened in the instant case.

Judge Goldstein did not merely urge DiBari to tell the truth. Rather, he told DiBari that petitioner and his

co-defendants were guilty, that they were "notorious gunmen and robbers" who had shot and almost killed a policeman in Queens, and that it was DiBari's civic duty to convict them. He instructed DiBari to repeat his incriminating Grand Jury testimony, and said DiBari would take defendants' place in jail if he refused to do so. Assistant District Attorney Helfand threatened to prosecute DiBari for perjury if DiBari deviated from his grand jury testimony. Judge Goldstein ordered DiBari jailed as a material witness, to give him time (as District Attorney Helfand put it) to think over the instructions he had been given.*

As discussed in detail in petitioner's Main Brief,** each of the Judge's techniques was improper. See pages 21 to 22, Main Brief (instructing witness to repeat Grand Jury testimony is error); see pages 19 to 21, Main Brief (threatening to prosecute witness for perjury, intimidating him in testifying is error); see pages 23 to 25, Main Brief (judge revealing he believes defendant is guilty is error). The whole thrust of Judge Goldstein's and District Attorney Helfand's comments was not to produce truthful testimony, but to produce incriminating

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* The statement at page 12 of respondent's brief, that the District Attorney moved to have DiBari committed as a material witness because DiBari's life was in jeopardy, ignores what is clear on the face of the mistrial transcript, i.e., that at least a major purpose of the imprisonment was to convince DiBari to testify as the judge and prosecutor advocated. See statement of Assistant District Attorney Helfand in hearing, reproduced at p. 7, Main Brief.

** Brief for Petitioner-Appellant, filed May 5, 1977 will be referred to as Main Brief.

testimony. The fact that the Judge and prosecutor believed that the "truth" was that defendants were guilty does not justify their conduct. Rather, Judge Goldstein's conveying this belief to DiBari was itself error, as discussed at pp. 23 to 25, Main Brief.

Respondent's Point I contains further misstatements which cannot be left uncorrected. Respondent states "Petitioner alludes to the fact that a mistrial was declared at his first trial because DiBari refused to identify the assailants because he feared for his life."* Petitioner agrees that a mistrial was declared because DiBari refused to testify, but, as discussed in the Main Brief, petitioner contends that it is unclear from the mistrial transcript whether DiBari refused to identify petitioner and his co-defendants as the assailants because he had been threatened, or because he had in fact no opportunity during the robbery to identify his assailants. The trial record does show DiBari was uncertain enough as to whether petitioner and his co-defendants were the robbers that two consecutive joint show-ups were required to get DiBari to identify them. And since DiBari testified in the Grand Jury after the show-ups were conducted,** even his

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* Brief for Respondent-Appellant, p. 13; (emphasis added).

** The show-ups were held on April 4 and 5, 1947; and the indictment was not presented by the grand jury until April 23, 1947 (Appendix, p. 29). Assuming there was no great lag between DiBari's testimony and the indictment, his grand jury testimony was given after the show-ups.

grand jury testimony may have been the product of the suggestive effect of the show-ups, rather than being based on his observation of his assailants during the robbery. In fact, there is no proof that DiBari had actually been threatened, other than his own statement to this effect, and nowhere does it appear in the record who allegedly threatened him -- one of the defendants, all of the defendants, or someone else. Threatening a witness is itself an indictable offense, yet it does not appear that any of defendants were charged with this crime. It is not inconceivable that DiBari seized upon having been threatened as a reason for avoiding making an identification he was unsure of anyway.

Respondent seeks to avoid having to deal with the cases cited in petitioner's Main Brief by mischaracterizing what Judge Goldstein said as something benign. The sole case cited by respondent on the subject of judges' conduct, Mooney v. United States, 320 F.Supp. 316 (E.D. Mo. 1970) is distinguishable because the judge's instruction on perjury in that case was not made until after the witness had testified, so that the instruction did not affect the witness' testimony. A case more closely at point would have been United States v. Reed, 421 F.2d 190 (5th Cir. 1969),* where the Fifth Circuit, en banc, reversed a conviction because the trial judge asked the defendant, at the time the defendant took the stand, whether the defendant knew what perjury was and, in explaining perjury, advised the defendant

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* Reversing en banc, 414 F.2d 435 (5th Cir. 1969).

not to make the mistake of commiting perjury. Respondent tries to distinquish some of petitioner's cases on the ground that they involved direct appeals, where the relief granted was reversal and a new trial. A new trial might have been a sufficient remedy if the instant case had been reversed on appeal and if DiBari had been reinstructed (to undo the damage done by Judge Goldstein), before he testified in the new trial. However, it cannot be argued that the trial before Judge Leibowitz -- where DiBari testified under the influence of Judge Goldstein's uncorrected instructions -- is all the relief that petitioner is entitled to. Rather, the habeas cases relied on in petitioner's Main Brief, such as Garrett v. Bounds, 328 F.Supp. 1175 (W.D.N.C. 1974); and Lane v. Warden, Maryland Penitentiary, 320 F.2d 179 (4th Cir. 1963) -- which respondent does not even try to distinguish -- require habeas relief be granted in the instant case.

Rebuttal of Respondent's Point II:

JURY CHARGE DID NOT VALIDATE USE OF CONSTITUTIONALLY DEFECTIVE IDENTIFICATION TESTIMONY

Respondent's basic argument in Point II is that habeas relief on the show-up issue is precluded because the trial judge charged the jury to be cautious about convicting on the basis of identification testimony. It is only necessary to read the charge to see the weakness of this argument: The charge did not discuss the danger that the two consecutive show-ups of petitioner and his co-defendants, grouped together -- rather than observation during the robbery -- caused DiBari to identify petitioner and

his co-defendants as the robbers. Only and one-half pages of the 20-page charge dealt with the identification issue, and that portion was only a most general instruction that the jury should be cautious in weighing proof as to identification. Such a boilerplate instruction would be an expected part of the charge in any case where identification was an issue. In fact, considering that the only evidence linking petitioner and his co-defendants to the robbery was DiBari's identification testimony, the few words Judge Leibowitz said about reliance on identification testimony were quite weak.

If respondent was correct that such a charge would "cure" admission of unconstitutional identification testimony, then the due process test set out by Neil, Simmons and Stovall* would be illusory, because every identification case includes some such boilerplate charge on identification testimony. To the contrary, the Neil line of cases does not direct the court to ask whether a jury charge concerning identification was given; but instead to ask whether (1) the pre-trial identification procedure was unnecessarily suggestive and if so, (2) whether identification testimony is nonetheless admissible because the witness had an independent basis for making the identification, based on observation of the criminal at the time of the crime. Neil therefore directs the habeas court to review the record of

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* Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. U.S., 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967) each discussed at p. 26 et seq. Main Brief.

the trial to see what happened during the crime and at the show-ups; not to ask whether a charge on identification was given in the trial.

In any event, even directly corrective charges -- which this was not -- have been held inadequate to remedy trial errors. See, e.g., United States v. Nazzaro, 472 F.2d 302 (2nd Cir. 1973); United States v. De Sisto, 289 F.2d 833 (2nd Cir. 1961); each holding that conduct of judge during trial required reversal, despite corrective charge; Davidson v. Boles, 266 F.Supp. 645 (N.D.W.Va. 1967), cert. denied, 391 U.S. 970 (1968); stating the rule that reversal is required where the illegal evidence presented to the jury was so impressive it probably remained in the jury's mind, despite an instruction to disregard it.

Respondent also argues that the suggestive show-ups cannot be grounds for relief because defendant's counsel cross-examined DiBari at trial. While a few cases have looked at the scope of cross-examination, summations, etc. to determine whether the jury was apprised of the dangers of misidentification from suggestive procedures, the cross-examination in this case did not serve that function. This was not a case where defendants' attorney brought out the occurrence of the show-ups in cross-examination, to throw doubt on DiBari's in-court identification of petitioner and his co-defendants.

Instead, the prosecution relied on the show-ups on direct, having DiBari testifying that he had identified petitioner and his co-defendants after the show-ups. Consequently, the jury may well have considered the show-up identification as bolstering the government's case, when they should have drawn the contrary inference. Even assuming that a jury could correctly weigh the factors -- (1) suggestiveness of identification procedure, and (2) existence of independent basis for identification -- that Neil directs the court to weigh; those issues were not effectively presented to the jury in the instant case.

Moreover, the jury was never informed -- by charge or testimony -- of the instructions given DiBari by Judge Goldstein and Assistant District Attorney Helfand, and thus lacked this additional information essential to evaluating the reliability of DiBari's identification.

Finally, one point must be cleared up in relation to respondent's description of DiBari's opportunity to observe the robbers during the crime. At page 8 of its brief, in describing the lighting of the area, respondent states that, in addition to the single 150 watt bulb twenty feet away in the shipping room, there were lights on near the front of the garage. However, it was brought out in further testimony that

those lights were around a corner and all the way across the garage, which was large enough to store over thirty trucks (Transcript, pp. 85 and 46, Appendix, pp. 96 and 57). This was much too far away to have lighted the ster area where the robbers were standing. If anything, lights that far behind the robbers would have made it more difficult to see their faces clearly.

CONCLUSION

For the reasons stated herein and in petitioner-appellant's Main Brief, the decision of the District Court should be reversed.

Dated: New York, New York
June 14, 1977

Respectfully submitted,

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AFFIDAVIT OF SERVICE

77-2038

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ALLEN CHIU, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 14th day of June, 1977, I caused the annexed Reply Brief for Petitioner-Appellant to be served upon:

The Attorney General
of the State of New York
Two World Trade Center
New York, New York

by leaving a true and correct copy thereof at the above-mentioned office.

Allen Chiu
Allen Chiu

Sworn to before me this
14th day of June, 1977

Thomas M. Doyle, Jr.
Notary Public

THOMAS M. DOYLE, JR.
Notary Public, State of New York
No. 31-4640596
Qualified in New York County
Commission Expires March 30, 1978